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No. 74-1025

Supreme Court of the United States

October Term, 1975

BURTICE A. HINES, *et al.*, *Petitioners*,

vs.

ANCHOR MOTOR FREIGHT, INC., *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file a brief as *amicus curiae* arguing that the portion of the decision of the Court of Appeals that this Court has agreed to review (43 U.S.L.Wk. 3571) was wrongly decided. Anchor Motor Freight, Inc. has denied its consent to the filing of said brief because its counsel "[felt] that the parties can adequately cover the issues raised in the case" and that therefore there was no "justification for *amicus curiae.*"

INTEREST OF THE AFL-CIO AND ISSUE TO BE COVERED IN ITS BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 111 national and inter-

national labor unions having a total membership of approximately 14 million working men and women.

As the majority spokesman for organized labor, the Federation has taken a continuing interest in the development of a principled body of law regarding the enforcement of collective agreements. The AFL-CIO has therefore, *inter alia*, filed a brief *amicus curiae* in *Vaca* v. *Sipes*, 386 U.S. 171, 174, 192 n.15, the case in which this Court first confronted the problem presently before it.

The petition and briefs in opposition concentrated on the particular circumstances of this case. It is our view that this emphasis serves to obscure the basic truth that this case is governed by *Vaca*. We believe that it will aid the Court in its deliberations to have a succinct statement of why that is so. The function of the accompanying brief *amicus curiae* is to provide such a statement.

CONCLUSION

For the above-stated reasons this motion for leave to file a brief as *amicus curiae* should be granted.

Respectfully submitted,

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October Term, 1975

No. 74-1025

Burtice A. Hines, *et al.*, *Petitioners*,

vs.

Anchor Motor Freight, Inc., *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

This is "an action by eight truck drivers for damages caused by their [allegedly] wrongful discharge by their employer and by the [alleged] breach of the duty of fair representation on the part of their union." (Pet. A 9.)[1] In other words, this is the "employee action," envisaged in *Vaca* v. *Sipes*, 386 U.S. 171, 196, against both an employer and a union "based on the employer's alleged breach of

[1] The Employer is Anchor Motor Freight, Inc., and the Union is Local Union No. 377, Chauffeurs, Teamsters, Warehousemen & Helpers.

contract plus the union's alleged wrongful failure to afford [the employees the] contractual remedy of arbitration."

The Court of Appeals held that since the Employees "met the requirement" of "making a [*prima facie*] showing that the action or inaction of the statutory representative complained of was motivated by bad faith," the "defendant local union's motion for summary judgment was improperly granted" by the district court. (Pet. A 14.) At the same time the court below also held "that the district court correctly granted summary judgment in favor of Anchor Motor Freight." (Pet. A 16.)

Thus, the lower court concluded that in a case in which an employee's claim is for wrongful discharge, the employee's case against the employer may be dismissed although he has a viable claim that the union breached its duty of fair representation in presenting his grievance to the arbitrator during the procedure established by the collective agreement for final determination of controversies arising under that agreement. Since the Union has not petitioned for *certiorari*, and since the Court has declined to review the other points raised in the Employees' petition (43 U.S. L.Wk. 3571), the validity of that conclusion is the only issue here.

We submit that the holding of the Court of Appeals is squarely contrary to the decisions of this Court in *Vaca* and *Czosek* v. *O'Mara*, 397 U.S. 25, and utterly misconceives the tripartite relationship between employees, employers and unions established by § 9(a) of the National Labor Relations Act, as amended, and §§ 203(d) & 301 of the Labor Management Relations Act, as amended.

1. The Employees' primary cause of action is the one against the Employer because "it is the employer's * * * [alleged] breach of contract which triggered the controversy." (*Vaca*, 386 U.S. at 197.) "[T]he [alleged] damage to [the] employees had its roots in their discharge." (*Czosek*, 397 U.S. at 28.) As we shall elaborate below (pp. 4-6), that is the reason employees cannot recover against either the employer or the union unless they can establish that they have been unlawfully discharged. But

> "where the bargaining agreement contains grievance and arbitration provisions which are intended to provide the exclusive remedy for breach of contract claims * * * and where the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 397 U.S. 650." (*Vaca*, 386 U.S. at 184-185.)

The major exception to this exclusivity rule was established in *Vaca*:

> "[T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." (*Id.* at 186; footnote omitted.)

The Court of Appeals' reversal of the grant of summary judgment in favor of the Union therefore restored to the Employees the opportunity to establish a jurisdictional precondition for their lawsuit. But it did not change the underlying nature of this suit as one for breach of contract against the Employer.

2. *Vaca* also teaches that if it is determined that the union breached its duty of fair representation, the employee not only may proceed against the employer but that his claim against the employer is his basic cause of action. Put another way, the employer's liability is primary and that of the union is secondary. The employee may recover at all only if he establishes that his discharge was wrongful and in that event he may recover from the employer the damages consequent upon that unlawful discharge.

Mr. Justice Rehnquist has recently reminded that "the very concept 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will." (*Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 324.) So far as we are aware, nothing in any federal or state statute places any limitation on an employer's unfettered common law prerogative to discharge an employee on the bare suspicion of wrongdoing. Moreover, if there are, or have ever been, any appreciable number of individual employment contracts modifying that common-law rule, that has escaped the attention of all those knowledgeable in the field. The existence of a collective bargaining agreement does not alter the basic relationship between the employer and the employee; it merely modifies, to the extent provided in the agreement, the absolute prerogative to discharge which the employer would otherwise enjoy. As Mr. Justice Douglas explained in *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584:

> "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function • • •."

Because in our system of industrial relations employment decisions are normally made by the employer, rather than the union, in *Vaca* Mr. Justice White asked "what portion of the employee's damages may be charged to the union: in particular, may an award against a union include • • • damages attributable solely to the employer's breach of contract?" (386 U.S. at 196-197.) And, he responded:

> "We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages.
>
> • • • •
>
> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of [the employee's] damages would still be attributable to his allegedly wrongful discharge by [his employer]." (*Id.* at 197-198.)[2]

In *Czosek*, Justice White returned to the same point, and in so doing made this holding more explicit:

> "Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union

[2] Of course where "a union has affirmatively caused the employer to commit the alleged breach of contract," the foregoing rationale does not apply. (*Id.* at 197, n. 18.)

> to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." (397 U.S. at 29.)

In sum, the employer is liable for "the natural consequence of [his] breaches of bargaining agreements" (*Vaca*, 386 U.S. at 186), *viz.*, the consequences "flow[ing from] • • • loss of employment," (*Czosek*, 397 U.S. at 29). For, the employer's independent action in discharging the employee is the sole cause of that loss. The union's later "unrelated • • • violat[ion of] a statutory duty in failing to press the grievance" is a cause not of that loss but of the employee's "added difficulty and expense of collecting from the employer." *(Id.)* And, the union is chargeable for the consequences of *its* wrong. *(Id.)* It follows that if, in fact, the employer did not violate the agreement the employee's suit based on his discharge, whether brought against the employer or the union or both must fail. For, the employee has not suffered any legal harm at the hand of the employer if the discharge was not a violation of the collective agreement, and, in such a case the union's failure to press his grievance did not "increase" (*Vaca*, 386 U.S. at 198) that non-existent harm.

3. The ultimate question, therefore, is whether the Employees can maintain their claim for wrongful discharge against the Employer. The Court of Appeals held that they could not because of the adverse disposition of their claim by the arbitration panel under the contractual grievance procedure. That court reasoned as follows (Pet. A15-A16):

> "Appellant contends that the employer did not have 'just cause' to discharge them because of the recantation of the motel clerk. As we said in Balowski v.

> International Union, *supra*, 372 F.2d [829] at 833,
>
> '[i]t is apparent that what plaintiff is attempting to do is to relitigate his grievance in his proceeding. This he cannot do when the collective bargaining agreement provides for final and binding arbitration of all disputes, absent a showing of fraud, misrepresentation, bad faith, dishonesty of purpose, or such gross mistake or inaction as to imply bad faith on the part of the Union or the employer. Cf. Smith v. Evening News Association, 372 U.S. 195.'
>
> "No evidence of any misconduct on the part of the employer to avoid the arbitration award is suggested. Although appellants argue that there was a conspiracy between the union and the company, none of the evidence offered to substantiate this claim is sufficient under the requirement of *Balowski, supra*, that something more than suspicion be shown. Accordingly, we hold that the district court correctly granted summary judgment in favor of Anchor Motor Freight. *See* United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593." (Footnote omitted.)

The foregoing reasoning would be unimpeachable but for the Court of Appeals' contemporaneous holding that the District Court had erred in granting summary judgment for the Union on the claim that it had breached the duty of fair representation in processing the discharge grievance.

Under *Vaca* the lower court's holding that the duty of fair representation claim against the Union was still alive pretermitted the conclusion that the suit against the Employer was barred by the outcome of the grievance procedure. For, as we have seen (pp. 2-3), *Vaca* held that an employee's claim for wrongful discharge against an employer is not

barred if the union breached its duty of fair representation in processing his claim. The essence of *Vaca* is that the principle of finality declared in *Republic Steel* assumes that the system has operated in the manner contemplated by Congress—*viz.*, that the union has met its responsibilities in conformity with the duty of fair representation imposed by § 9(a).[3]

[3] *Balowski* v. *International Union, etc.*, 372 F.2d 892 (C.A. 6) which the court below purported to follow is entirely consistent with our analysis. That case was likewise a suit by an employee under a collective bargaining agreement after an arbitration unfavorable to the employee. In Part I of the Court of Appeal's opinion (372 F.2d at 831-833), the court held the arbitrator's award to be final and binding. In part II (*id.* at 833-835), that court dealt with the employee's claim that the union had breached its duty of fair representation. After determining that his complaint was insufficient to allege such a breach, the court said:

> "This finding disposes of the claims against General Motors as well as the claims against the defendant Unions. Ostrofsky v. United Steelworkers, 171 F. Supp. 782, aff'd 273 F.2d 614, cert. denied, 363 U.S. 849. We therefore hold that in light of the foregoing, defendants' motions for summary judgment should have been granted." (*Id.* at 835.)

If the Court of Appeals had considered the arbitration award to be final even if the union had breached its duty of fair representation, the finding in the union's favor would have been irrelevant to the claim against General Motors. Thus, implicit in the quoted statement is the understanding that the arbitration award would not have been final if the employee's claim against the union could stand. What is but elliptically stated in *Balowski* is made clear by the *Ostrofsky* case, which it cites:

> "• • • plaintiffs cannot sue Bethelehem for their allegedly wrongful discharge unless the Union acted arbitrarily or in a discriminatory manner in refusing to press plaintiffs' grievances to arbitration under the Agreement and thereby breached its duty of fair representation. This is the same issue which controls plaintiffs' claims against the Unions." (171 F. Supp. at 792.)

Then, having determined that the union breached no duty to

The only difference between *Vaca* and this case is that there the union's action kept the case from ever reaching arbitration, whereas it is alleged here that the Union's bad faith presentation infected the award. This difference in fact cannot affect the legal result. For, the principle of the finality of arbitration awards declared in the *Steelworkers Trilogy*, on which the Court of Appeals herein relied, rests on § 203(d) of the Act:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 State 154, 29 USC § 173(d), states "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." (*Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566.)

The principle of finality declared in *Republic Steel* rests on the same statutory basis. (See 379 U.S. at 653.) And since the union's duty has the same statutory basis (§ 9(a)) in both situations, the accommodation of the applicable principles must also be the same.

Finally, *Vaca* makes clear that the Court of Appeals was mistaken in its reliance on the absence of "misconduct on the part of the employer" in the grievance procedure, and on the employees' failure to prove a conspiracy between the

the employees the *Ostrofsky* Court concluded, in language which presaged that in *Balowski*:

> "This finding disposes of the claims against Bethlehem as well as the claims against the Union. It is not necessary to decide whether Bethlehem had just cause for discharging the plaintiff." (*Id.* at 794.)

union and the employer:

> "It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit wer it not for the union's breach of its statutory duty of fair representation to the employee. To leave he employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." (386 U.S. at 185-186.)

CONCLUSION

For the above-stated reasons the Court of Appeals' affirmance of summary judgment in favor of Anchor Motor Freight, Inc. should be reversed.

Respectfully submitted,

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